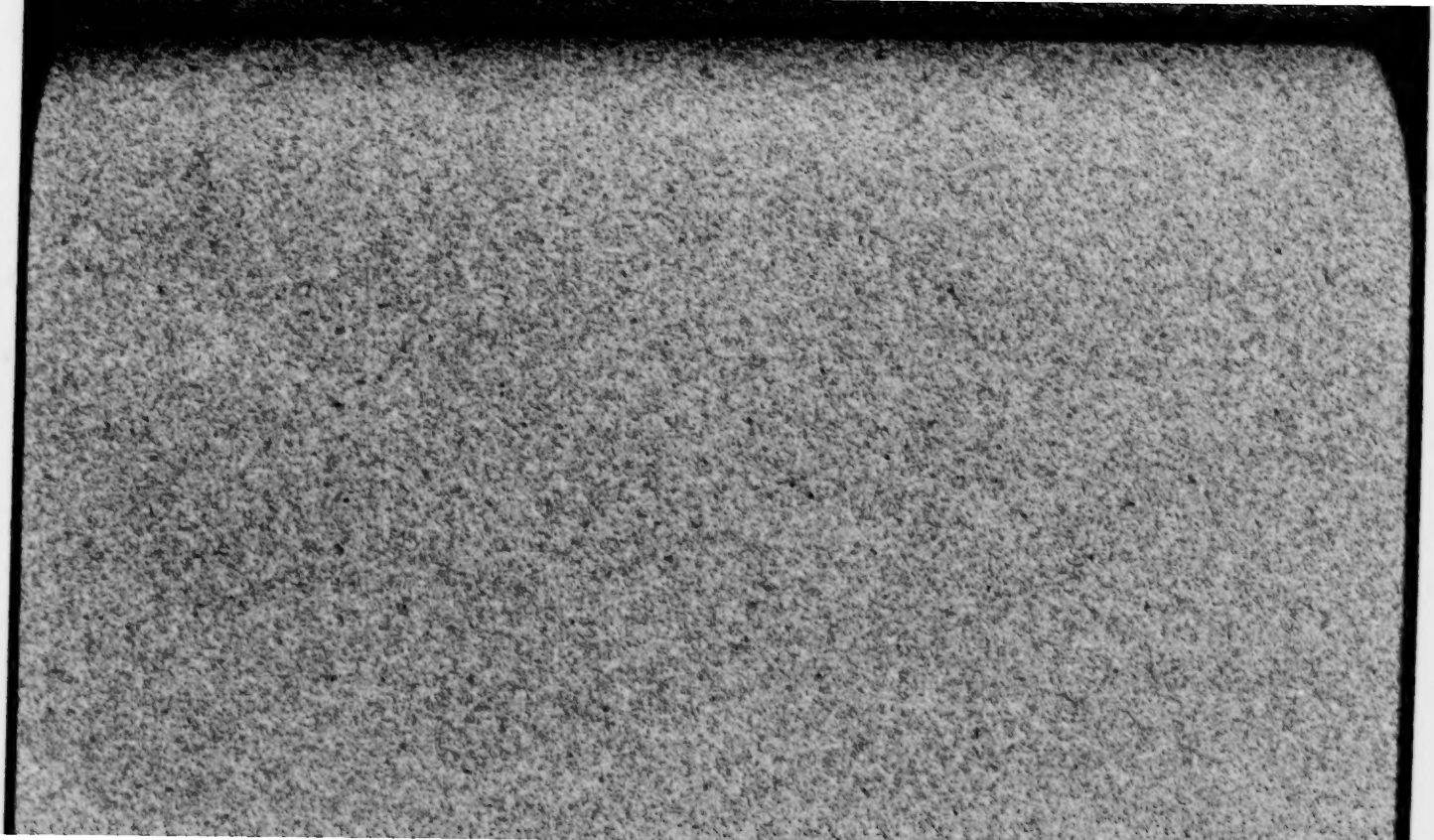

No. 324.

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

v.

L. COHEN GROCERY COMPANY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

BRIEF FOR THE UNITED STATES.

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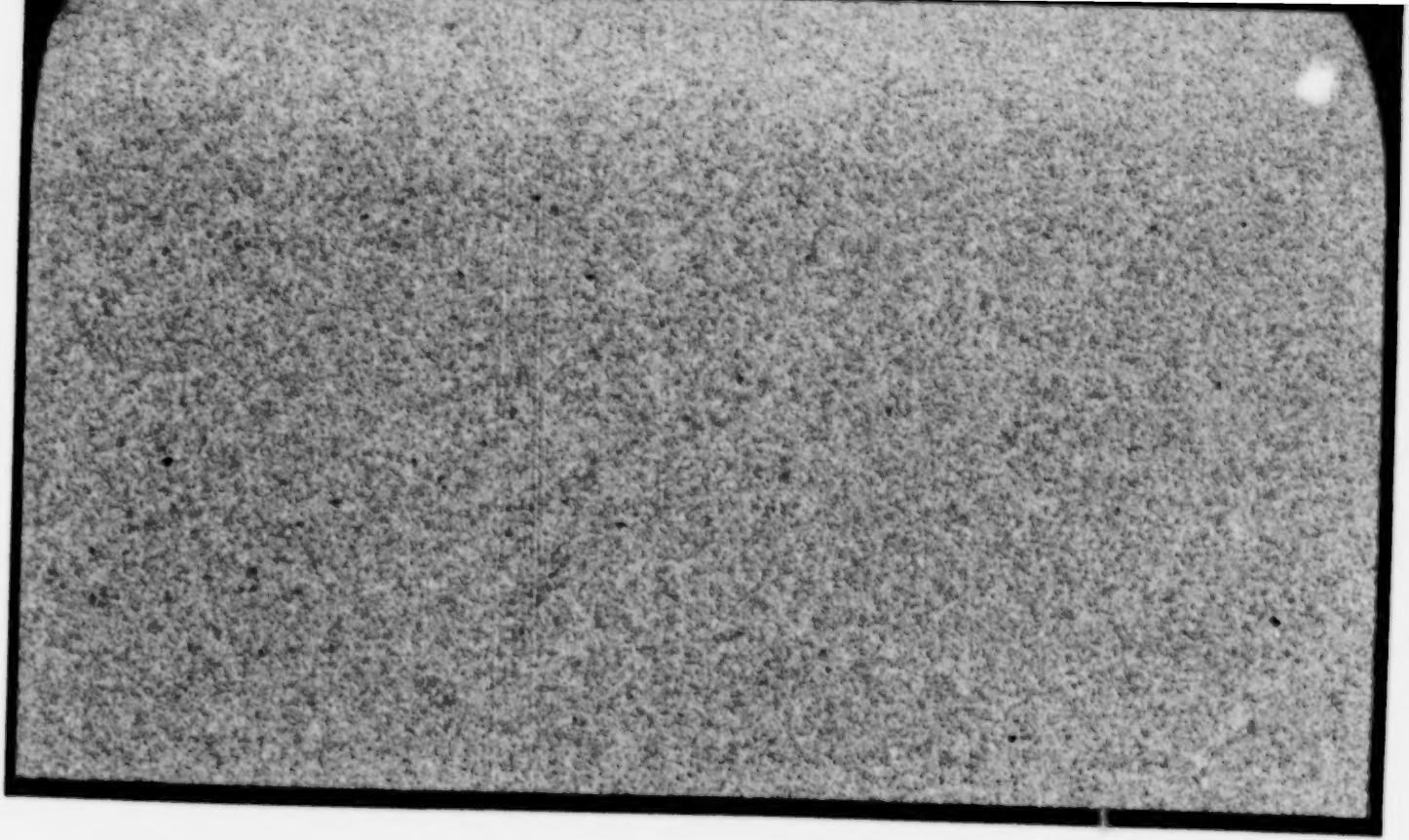

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IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

BRIEF FOR THE UNITED STATES.

This is one of several cases involving the constitutionality of section 4 of the Act of August 10, 1917 (40 Stat., c. 53, p. 276), known as the Food Control or Lever Act, as amended by section 2 of the Act of October 22, 1919 (41 Stat., 1st Session, c. 80, p. 297).

It is here on writ of error to review the judgment of the District Court sustaining a demurrer to an indictment charging the defendant in error with selling sugar at an unjust and unreasonable rate and charge.

STATUTES INVOLVED.

The Food Control or Lever Act was passed "to assure an adequate supply and equitable distribution, and to facilitate the movement of foods, feeds, fuel,

including fuel oil and natural gas, and fertilizer and fertilizer ingredients, tools, utensils, implements, machinery, and equipment required for the actual production of foods, feeds, and fuel," which are defined as necessaries, and to "prevent, locally or generally, scarcity, monopolization, hoarding, injurious speculation, manipulations, and private controls, affecting such supply, distribution, and movement; and to establish and maintain governmental control of such necessaries during the war." Section 4 of the Act is as follows:

> That it is hereby made unlawful for any person willfully to destroy any necessaries for the purpose of enhancing the price or restricting the supply thereof; knowingly to commit waste or willfully to permit preventable deterioration of any necessaries in or in connection with their production, manufacture, or distribution; to hoard, as defined in section six of this Act, any necessaries; to monopolize or attempt to monopolize, either locally or generally, any necessaries; to engage in any discriminatory and unfair, or any deceptive or wasteful practice or device, or to make any unjust or unreasonable rate or charge, in handling or dealing in or with any necessaries; to conspire, combine, agree, or arrange with any other person, (a) to limit the facilities for transporting, producing, harvesting, manufacturing, supplying, storing, or dealing in any necessaries; (b) to restrict the supply of any necessaries; (c) to restrict distribution of any necessaries; (d) to prevent, limit, or lessen the

> manufacture or production of any necessaries in order to enhance the price thereof, or (e) to exact excessive prices for any necessaries; or to aid or abet the doing of any act made unlawful by this section.

By other sections of the Act a violation of this section in several of the respects mentioned was made a criminal offense. But as to others, instead of making the Act an offense to be prosecuted, the enforcement of the law was to be accomplished through a license system, and the carrying on of the business without a license was made a criminal offense. This system was provided by section 5, which was as follows:

> That, from time to time, whenever the President shall find it essential to license the importation, manufacture, storage, mining, or distribution of any necessaries, in order to carry into effect any of the purposes of this Act, and shall publicly so announce, no person shall, after a date fixed in the announcement, engage in or carry on any such business specified in the announcement of importation, manufacture, storage, mining, or distribution of any necessaries as set forth in such announcement, unless he shall secure and hold a license issued pursuant to this section. The President is authorized to issue such licenses and to prescribe regulations for the issuance of licenses and requirements for systems of accounts and auditing of accounts to be kept by licensees, submission of reports by them, with or without oath or affirmation, and the

entry and inspection by the President's duly authorized agents of the places of business of licensees. Whenever the President shall find that any storage charge, commission, profit, or practice of any licensee is unjust, or unreasonable, or discriminatory and unfair, or wasteful, and shall order such licensee, within a reasonable time fixed in the order, to discontinue the same, unless such order, which shall recite the facts found, is revoked or suspended, such licensee shall, within the time prescribed in the order, discontinue such unjust, unreasonable, discriminatory and unfair storage charge, commission, profit, or practice. The President may, in lieu of any such unjust, unreasonable, discriminatory, and unfair storage charge, commission, profit, or practice, find what is a just, reasonable, nondiscriminatory and fair storage charge, commission, profit, or practice, and in any proceeding brought in any court such order of the President shall be prima facie evidence. Any person who, without a license issued pursuant to this section, or whose license shall have been revoked, knowingly engages in or carries on any business for which a license is required under this section, or willfully fails or refuses to discontinue any unjust, unreasonable, discriminatory and unfair storage charge, commission, profit, or practice, in accordance with the requirement of an order issued under this section, or any regulation prescribed under this section, shall, upon conviction thereof, be punished by a fine not exceeding $5,000, or by imprisonment for not more than two years, or

both: *Provided*, That this section shall not apply to any farmer, gardener, cooperative association of farmers or gardeners, including livestock farmers, or other persons with respect to the products of any farm, garden, or other land owned, leased, or cultivated by him, nor to any retailer with respect to the retail business actually conducted by him, nor to any common carrier, nor shall any thing in this section be construed to authorize the fixing or imposition of a duty or tax upon any article imported into or exported from the United States or any State, Territory, or the District of Columbia: *Provided further*, That for the purposes of this Act a retailer shall be deemed to be a person, copartnership, firm, corporation, or association not engaging in the wholesale business whose gross sales do not exceed $100,000 per annum.

It will be seen, therefore, that, under this Act, the making of an unjust or unreasonable rate or charge in handling or dealing in necessaries was not made a criminal offense. The President, however, was given power to require that persons engaged in the importation, manufacture, storage, mining, or distribution of necessaries should first secure a license under authority from him. He was given authority to revoke the license of any licensee found making any unreasonable or unjust commission or profit, if such licensee should fail to discontinue such charges upon being ordered to do so. This method, of course, was effective, because of the provision that a person doing business after the revocation of his license should be

subject to a fine of not exceeding $5,000 or imprisonment for not more than two years, or both. The President exercised the authority conferred by this Act through the Food Administration, and thus, by administering a system of licenses, controlled the prices of necessaries, to the end that they should not be unjust or unreasonable.

After the Food Administration went out of existence, however, and the system of licenses was not longer continued, the declaration of section 4, that it shall be unlawful to make unjust or unreasonable rates or charges in handling or dealing in necessaries, became practically a dead letter because there was no way to enforce it. Congress deemed it unwise or unnecessary to continue the Food Administration as it had existed during actual hostilities. Instead, it passed the Act of October 22, 1919 (41 Stat., 1st Session, c. 80, p. 297), amending the Lever Act. By the first section of the Act of October 22, 1919, wearing apparel and certain other articles were added to the list of articles included in the definition of "necessaries" in the original Act.

Section 2 is as follows:

> That section 4 of such Act of August 10, 1917, is hereby amended to read as follows:
>
> "That it is hereby made unlawful for any person willfully to destroy any necessaries for the purpose of enhancing the price or restricting the supply thereof; knowingly to commit waste or willfully to permit preventable deterioration of any necessaries in or in connection with their production, manufacture, or

distribution; to hoard, as defined in section 6 of this Act, any necessaries; to monopolize or attempt to monopolize, either locally or generally, any necessaries; to engage in any discriminatory and unfair, or any deceptive or wasteful practice or device, or to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries; to conspire, combine, agree, or arrange with any other person (a) to limit the facilities for transporting, producing, harvesting, manufacturing, supplying, storing, or dealing in any necessaries; (b) to restrict the supply of any necessaries; (c) to restrict distribution of any necessaries; (d) to prevent, limit, or lessen the manufacture or production of any necessaries in order to enhance the price thereof; or (e) to exact excessive prices for any necessaries, or to aid or abet the doing of any act made unlawful by this section. Any person violating any of the provisions of this section upon conviction thereof shall be fined not exceeding $5,000 or be imprisoned for not more than two years, or both: *Provided*, That this section shall not apply to any farmer, gardener, horticulturist, vineyardist, planter, ranchman, dairyman, stockman, or other agriculturist, with respect to the farm products produced or raised upon land owned, leased, or cultivated by him: *Provided further*, That nothing in this Act shall be construed to forbid or make unlawful collective bargaining by any cooperative association or other association of farmers, dairymen, gardeners, or other producers of farm products with respect

> to the farm products produced or raised by its members upon land owned, leased, or cultivated by them."

It will be observed that it is thus made a criminal offense, punishable by fine and imprisonment, "to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries," and this is the offense with which the defendant in error is charged.

THE INDICTMENT.

The indictment contains two counts. The first count charges that the defendant in error, a dealer in sugar and other necessaries, on or about the 3d day of December, 1919, "did willfully and feloniously make an unjust and unreasonable rate and charge in handling and dealing in a certain necessary, to wit, sugar, in this, to wit:"

> That it, the said L. Cohen Grocery Company, not then and there being a farmer, gardener, horticulturist, vineyardist, planter, ranchman, dairyman, stockman, or other agriculturist engaged in dealing in farm products produced or raised upon any land owned, leased, or cultivated by it, on or about the said 3d day of December, A. D. 1919, at the city of St. Louis, in the State of Missouri, and within the division and district aforesaid, and within the jurisdiction of the court aforesaid, being engaged as a dealer in the necessary as aforesaid, did willfully and feloniously demand of, and exact and collect from and of one B. Heligman, whose given name is to the grand jurors

unknown and can not, therefore, be herein set out, the sum of ten dollars and seven cents ($10.07), as and for the purchase price of about fifty (50) pounds of granulated sugar then and there purchased by the said B. Heligman from the said L. Cohen Grocery Company, which said purchase price so demanded, exacted, and collected for the said granulated sugar by the said L. Cohen Grocery Company from the said B. Heligman was and constituted an unjust and unreasonable rate and charge as it, the said L. Cohen Grocery Company, then and there well knew (Rec. p. 3.)

The second count charges a similar transaction in exactly the same form.

THE DEMURRER.

Defendant in error, by its demurrer, presents the following contentions:

1. That the indictment did not sufficiently or in any manner advise the defendant of the nature and cause of the accusation or state facts which would enable the defendant to properly prepare for trial or advise it of what it will be required to meet at the trial, or such facts as, in the event of a conviction or acquittal, will enable the defendant to plead the result in bar to a subsequent indictment for the same offense.

2. That Congress having declared the object of the statute to be the furtherance and success of the military and naval operations of the United States in the war against the German Imperial Government

was without authority to pass the Act of October 22, 1919, for the reason that the necessity for such an enactment had passed because of the actual cessation of the military and naval operations by the United States, and hence that that Act was an invasion of the rights of the States.

3. That the second section of the Act of October 22, 1919, violates the Sixth Amendment to the Constitution in that it affords no standard or criterion by which he can or could determine whether any act contemplated by him would be violative of the statute; it does not afford a standard or criterion in conformity to which an indictment based upon the section will or can advise one accused under the section of the nature and cause of the accusation against him; it contains and provides no definition of terms employed so that it can be determined whether an act alleged to have been done is such an act as the section prohibits; it leaves to the determination of courts and juries what the Congress alone can determine within any lawful limitations, conditions, or circumstances. (Rec., pp. 5–6.)

RULING OF THE COURT BELOW.

The District Judge, in acting upon the demurrer, held that, since a state of war existed on October 22, 1919, Congress could at that time lawfully exercise its war powers, and that the fact that actual hostilities had ceased did not interpose any constitutional obstacle in the way of the passage of an Act of this kind. He, however, held that section 2 of the Act was too vague, indefinite, and uncertain to be enforced by the

courts and that it, in effect, delegated legislative power to the juries of the country by not fixing any definite or certain rule by which human conduct can be uniformly governed, and upon this ground sustained the demurrer and quashed the indictment. (Rec., pp. 6–12.)

BRIEF.

This case has been advanced and set for hearing on the same day with several other cases involving the same statutes. In some of these cases objections have been made to the statute which have not been suggested in this case. This brief will be confined to a discussion of the questions raised and passed on in the court below. If any of the other questions shall be brought into the argument in this case, the Government's reply will be found in its brief in the case in which those questions were passed on in the court below.

I.

Both in August, 1917, and in October, 1919, when the Acts in question were passed, Congress, in the exercise of its war powers, had full authority to enact all proper legislation to assure an adequate supply and equitable distribution of the necessaries of life.

The first contention made against the statute is that the offense charged was not a crime under the laws of the United States until the passage of the Act of October 22, 1919, and that, at that time, Congress was without power to enact such legislation because actual hostilities in our war with Germany had

ceased. The District Judge correctly held that this contention was not tenable. It is readily conceded that ordinarily legislation of this kind is not within the power of Congress to enact. But when war is declared, the manhood and all the resources of the country are subject to the call of the Government, to the end that the war may be successfully prosecuted. For the raising of armies the Government may draft every man in the country for such service as he is capable of rendering, but a war can not be fought by simply raising armies.

Arms, munitions, and subsistence must be provided for the men in the field. For this purpose, the resources of the Nation must be husbanded and conserved. Those not in the field must produce the things necessary for the support of the army. While thus engaged it is of vital importance to the Government and to the success of the war that they themselves shall have the means of subsistence. It is not denied, therefore, that in 1917, when the war was raging and when the Lever Act was passed, Congress had the power to enact legislation necessary to accomplish the purposes recited in that Act. The act charged in the indictment, however, was not made a criminal offense by that Act, and the insistence is that when actual hostilities ceased the power of Congress to enact legislation for the purposes recited in the original Act also ceased. This, however, involves entirely too narrow a view of the war powers of Congress. These powers are not limited to the things that are necessary to enable

armies to fight. They include all those things which are necessary not only to bring the war to a successful end but to restore the country to peace conditions. In order to fully accomplish the ends for which the war was fought, it may be necessary for Congress to exercise some of its war powers even after a formal declaration of peace. It is not necessary, however, to go that far in this case. There has not yet been a declaration of peace. An armistice, it is true, was signed before the Act of October, 1919, was passed, but the signing of an armistice is not the conclusion of a war. On the contrary, it expressly recognizes the existence of a state of war and is nothing but an agreement between the belligerents to temporarily suspend actual hostilities for the purpose of negotiating terms of peace. At the time the Lever Act was passed Congress was evidently of the opinion that it would not be necessary to continue in force the extraordinary measures then being taken to conserve the resources of the country for war purposes longer than the date of the termination of the war, but that it would be necessary to continue them in force that long. It was therefore provided under section 24—

> That the provisions of this Act shall cease to be in effect when the existing state of war between the United States and Germany shall have terminated, and the fact and date of such termination shall be ascertained and proclaimed by the President.

The question, therefore, is whether Congress may exercise its war powers until the termination of the

war has been ascertained and proclaimed by the President. The answer to this question seems to admit of but little doubt. A declaration of war brings the country into a state of war. When this occurs the duty of determining to what extent armies shall be raised and the resources of the country husbanded for the purposes of the war devolves upon Congress uncontrolled by the courts. The power is in Congress, and the extent to which it shall be exercised is committed to the discretion of Congress. The country at large, including individual judges, may entertain the opinion that only a very small army is necessary. But if Congress thinks a very large army will be required there is both the duty and the power to raise such an army. Congress, in other words, is made the judge of the necessities of the occasion. So, when an armistice is signed, it may be the general opinion that conditions are such that the resumption of hostilities is an impossibility and that, therefore, for all practical purposes, the war is at an end. It may accordingly be very generally felt that it is not necessary to continue in force war measures. But, again, Congress is the judge. If a mistake is made and a resumption of hostilities finds the country unprepared, a terrible responsibility rests upon Congress. Until the war is formally ended, no man can say, with absolute certainty, that hostilities will not be resumed and both men and resources required for the further prosecution of the war. Congress may conclude that, in view of conditions as they exist, the probability of a resumption of hostilities is so remote

that the temporary armies which have been raised may be demobilized and many of the preparations for a continued warfare discontinued. In this condition it may conclude that all war measures may be safely abandoned. But, on the other hand, it may conclude that the armies may be demobilized without endangering the safety of the country only upon condition that, until peace is formally declared, such conditions shall be maintained that new armies may be quickly organized and equipped. In other words, during the period of an armistice Congress possesses all the powers which it possessed as a result of the declaration of war and is, as it has been during the entire period of the war, the sole judge of the extent to which it is necessary to exert these powers in order to properly protect the country and to meet any emergency that it thinks may probably arise before peace is fully accomplished. Thus it was said in *Stewart* v. *Kahn* (11 Wall. 493, 506):

> The measures to be taken in carrying on the war and to suppress insurrection are not defined. The decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are confided by the Constitution.

In other words, when a state of war exists, the duty of taking necessary measures for the protection of the country is committed by the Constitution to Congress, and it must determine the question as to what measures are necessary. And in the same

case, speaking of the war power of Congress, it was said that —

> the power is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress. (11 Wall. 507.)

The powers of Congress, therefore, which were called forth by the declaration of war, continue to exist until a victory in the field, and then until Congress is satisfied that there is no danger of an immediate renewal of the conflict, and then until the conditions peculiar to war which have arisen in its progress have been removed. The right to exercise these powers is in no wise arrested by the signing of an armistice. The necessity for their exercise may be reduced to a minimum or even entirely removed, but all arguments as to the lack of a necessity for their exercise must be addressed to Congress and not to the courts so long as a state of war exists. It was for these reasons that this court held constitutional a prohibition act passed six days later than the Act now in question. (*Ruppert* v. *Caffey*, 251 U. S. 264; *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146.) These cases are conclusive of the question now made and fully justify the ruling of the District Judge on this question.

II.

The war conditions were such as to make it imperative that Congress exert whatever power it had to encourage the production of necessaries and to regulate their prices.

It will scarcely be denied that, when the Lever Act was passed, there were war conditions furnishing ample—indeed controlling—reasons for the exertion by Congress of whatever power it had to encourage the production, compel the conservation, and regulate the prices of the necessaries of life. A world war had been in progress for three years. Practically all the great nations were involved. Millions of men had been withdrawn from agricultural and industrial pursuits to compose the contending armies. The industry of the world, except in this and a few other countries, was paralyzed. This country itself had recently entered the war. Millions of its active, producing men were to become soldiers. There was already a shortage throughout the world of foodstuffs and other necessaries. This shortage was becoming more acute every day. This Government itself was under the necessity of providing subsistence for the immense armies which it was raising. Hundreds of thousands of its citizens must be used in the activities peculiar to the war itself. The raising of its armies was creating a shortage in labor throughout the land. These conditions, under all the control that could be exerted by any Government, were certain to result in a rapid enhancement in the cost of the necessaries of life. This would affect the

Government itself as the largest purchaser of such necessaries and, at the same time, would affect the wellbeing of every person within the United States. Both the Government and the public at large were vitally interested. It was unavoidable that the cost of living should, for these reasons, become burdensome. Moreover, the conditions existing were such as have always appealed to the cupidity of those who would sacrifice the public interest to secure unconscionable gains for themselves. A government that would fail to exert all its legitimate powers to minimize these burdens would be criminally remiss and deserving of the severest condemnation. It can not be denied, therefore, that there was an occasion for the exertion of the most drastic power consistent with the Constitution, and that hence the only question now is whether the measures enacted were within the constitutional powers of Congress.

III.

The regulation of the prices of the necessaries of life is a proper governmental function which, when deemed necessary for the prosecution of a war, Congress may exercise.

The regulation of prices of the necessaries of life, so far as it is a proper governmental function, belongs, under our system, in time of peace, to the States rather than to the Federal Government, except to the extent that it may be accomplished through the exertion of some of the powers expressly conferred upon Congress. It is, in its nature, a police power

and thus, generally speaking, is reserved to the States. It has, however, been too often decided to require the citation of authorities that, in the exertion of its express powers, Congress may exert such police power as may be necessary to make effective the powers conferred upon it. It follows, as was said in the recent prohibition cases, that, with respect to any subject with which Congress may deal in a war measure, it may exert all the police power which a State could ordinarily exert over the same subject. Hence, if, in time of peace, a State may control and regulate the prices of necessaries the Federal Government may do the same when necessary as a war measure.

A State under our system has all of the governmental powers which, before the Revolution, inhered in the British Government, save only those which have been since surrendered to the Federal Government. A State government may exert all such powers except as restricted by the State constitution. This proposition can now scarcely be open to debate. In *Munn* v. *Illinois* (94 U. S. 113, 124), this court, when considering a statute of Illinois limiting the charges which could lawfully be made by grain warehouses, had occasion to examine very carefully into the powers of State governments with respect to such matters and said:

> When the people of the United Colonies separated from Great Britain, they changed the form, but not the substance, of their government. They retained for the purposes

> of government all the powers of the British Parliament, and through their State constitutions, or other forms of social compact, undertook to give practical effect to such as they deemed necessary for the common good and the security of life and property. All the powers which they retained they committed to their respective States, unless in express terms or by implication reserved to themselves. Subsequently, when it was found necessary to establish a national government for national purposes, a part of the powers of the States and of the people of the States was granted to the United States and the people of the United States. This grant operated as a further limitation upon the powers of the States, so that now the governments of the States possess all the powers of the Parliament of England, except such as have been delegated to the United States or reserved by the people.

From time immemorial the government of England has exercised the power to forbid any and all practices which had the effect of unduly enhancing the price which the people must pay for necessaries. "Forestalling the market," "engrossing the market," and "regrating" were offenses under the common law. They are defined by Blackstone (Tucker, vol. 4, pp. 159–160), as follows:

> The offense of forestalling the market is also an offense against public trade. This, which (as well as the two following) is also an offense at common law, was described by statute 5 and 6 Edward VI, chap. 14 [enacted A. D. 1552–

1553], to be the buying or contracting for any merchandise or victual coming in the way to market; or dissuading persons from bringing their goods or provisions there; or persuading them to enhance the price, when there; any of which practices makes the market dearer to the fair trader.

Regrating was described by the same statute to be the buying of corn, or other dead victual, in any market, and selling it again in the same market, or within four miles of the place. For this also enhances the price of the provisions, as every successive seller must have a successive profit.

Engrossing was also described to be the getting into one's possession, or buying up, large quantities of corn, or other dead victuals, with intent to sell them again. This must, of course, be injurious to the public, by putting it in the power of one or two rich men to raise the price of provisions at their own discretion. And so the total engrossing of any other commodity, with intent to sell it at an unreasonable price, is an offense indictable and finable at the common law. And the general penalty for these three offenses by the common law (for all the statutes concerning them were repealed by 12 Geo. III, c. 71) is, as in other minute misdemeanors, discretionary fine and imprisonment.

The ultimate object of these rules of law was obviously to prevent those dealing in the necessaries of life from extorting from the consumer unreasonable prices. When necessary to prevent this, the common

law thus went so far as to absolutely prohibit the buying for resale and of course an added profit—under certain conditions.

With respect to the laws above referred to, it is said in Russell on Crimes (7th Ed., vol. 2, p. 1919):

> Every practice or device by act, conspiracy, words or news, to enhance the price of victuals or other merchandise, was held to be unlawful at common law; as being prejudicial to trade and commerce, and injurious to the public in general. Practices of this kind came under the notion of forestalling, which meant buying goods on the way to market or inducing persons not to take the goods to market in order to enhance prices or evade tolls. It was treated as including engrossing, or buying up standing corn, or corn in sheaf, or victuals wholesale for the purpose of regrating; that is, selling at monopoly prices, and all other offenses of like nature.

The purpose and object of these common-law rules and their relation to the freedom of trade are well shown in the case of *King* v. *Waddington* (1st East, pp. 143, 163), decided in 1800, where it was said:

> In mitigation of punishment the Court has been repeatedly and strongly addressed upon the freedom of trade; as if it were requisite to support the freedom of trade that one man shall be permitted for his own private emolument to enhance the price of commodities become necessaries of life, and thereby possibly prevent a large portion of his majesty's subjects from purchasing those necessaries at all.

> The freedom of trade, like the liberty of the press, is one thing; the abuse of that freedom, like the licentiousness of the press, is another. God forbid that this Court should do anything that should interfere with the legal freedom of trade. * * * But the same law that protects the proprietors of merchandise takes an interest also in the concerns of the public, by protecting the poor man against the avarice of the rich; and from all time it has been an offense against the public to commit practices to enhance the price of merchandise coming to market, particularly the necessaries of life, for the purpose of enriching an individual. The freedom of trade has its legal limits.

Since practices such as have been referred to were unlawful under the common law, for the sole reason that they unduly enhanced prices, the object of that law was to regulate prices and keep them within reasonable limits. The power to forbid these practices, of course, implies the power to directly prohibit the thing which such practices would accomplish. Obviously, if prices could be kept within reasonable limits merely by prohibiting certain practices which affect them, a government would not find it necessary to undertake the difficult task of itself fixing prices. Ordinarily, such fixing of prices will not be necessary when everything which interferes with free and open competition is forbidden. But the British Government from the earliest times has never hesitated to actually fix prices when other means have been

found inadequate, or to require, in general terms, that vendors of necessaries sell them at reasonable prices and moderate gains. The Statute of Laborers, passed in 1349 (2 Stat. of England, c. VI, pp. 26, 28), provided that all sellers of victuals should be bound to sell them "for a reasonable price having respect to the price that such victual be sold at in the places adjoining, so that the same sellers have moderate gains, and not excessive." The Statute of Herrings (1357) (2 Stat. of England, p. 117) fixed the price of herrings. The Statute of 1363 (2 Stat. of England, p. 162), in chapter 5, after reciting that grocers engross all manner of merchandise by combination in gilds, selling that which is most dear and keeping in store the other, it was provided that a merchant should deal in only one kind of merchandise. By chapter 3 of the same statute the price of poultry was fixed, and by chapter 15 the prices of clothes. In 1389 justices of the peace were authorized to fix wages according to circumstances, and it was provided that victuallers "shall have reasonable gains, according to the discretion and limitation of said justices, and no more, upon pain to be grievously punished. (2 Stat. of England, c. 8, pp. 313–314.) In 1433 the price of candles was fixed by the price of plain wax. (3 Stat. of England, c. XII, p. 196.) In 1487 the prices of cloths and hats were fixed by a maximum rate. (4 Stat. of England, c. VIII, IX, p. 41.) In 1531 brewers were prohibited from charging higher prices for ale and beer "than shall be thought convenient and sufficient

by the discretions of the justices of the peace within every shire" or by the officials of cities, boroughs, and towns. (4 Stat. of England, c. V, p. 220.) In 1533 it was provided that whenever complaint was made of enhancing the price of victuals certain state officials should have power from time to time "to set and tax reasonable prices of all such kinds of victuals." (4 Stat. of England, c. II, pp. 263, 264.) In 1536 certain officials were authorized to set the price of wines. (4 Stat. of England, c. XIV, p. 439.) In 1549 all persons were prohibited from buying butter and cheese to sell again, unless they sold by retail in open market. (5 Stat. of England, c. XXI, p. 347.) In 1709 the price of bread was fixed by the price of wheat. (12 Stat. of England, c. XVIII, p. 77.) Numerous other similar statutes could be cited, but the above sufficiently illustrate governmental practices under the common law. That the power to enact such laws passed to and remains in the several States of the Union has always been recognized by this court. In the case of *Munn* v. *Illinois*, *supra*, at pp. 124–125, the Chief Justice said:

> When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. "A body politic," as aptly defined in the preamble of the Constitution of Massachusetts, "is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good."

This does not confer power upon the whole people to control rights which are purely and exclusively private (*Thorpe* v. *R. & B. Railroad Co.*, 27 Vt. 143); but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another. This is the very essence of government, and has found expression in the maxim *sic utere tuo ut alienum non laedas*. From this source come the police powers, which, as was said by Mr. Chief Justice Taney in the *License Cases* (5 How. 583), "are nothing more or less than the powers of government inherent in every sovereignty, * * * that is to say, * * * the power to govern men and things." Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day statutes are to be found in many of the States upon some or all these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property. With the Fifth Amendment in

force, Congress, in 1820, conferred power upon the city of Washington "to regulate * * * the rates of wharfage at private wharfs, * * * the sweeping of chimneys, and to fix the rates of fees therefor, * * * and the weight and quality of bread" (3 Stat. 587, sec. 7); and, in 1848, "to make all necessary regulations respecting hackney carriages and the rates of fare of the same, and the rates of hauling by cartmen, wagoners, carmen, and draymen, and the rates of commission of auctioneers" (9 id. 224, sec. 2).

From this it is apparent that, down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The amendment does not change the law in this particular; it simply prevents the States from doing that which will operate as such a deprivation.

The Chief Justice then proceeded to inquire into the principle upon which this power of regulation rests and said (pp. 125–126):

Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is "affected with a public interest, it ceases to be *juris privati* only." This was said by Lord Chief Justice Hale more than two hundred years ago in his treatise *De Portibus Maris* (1 Harg. Law Tracts, 78), and

> has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but so long as he maintains the use, he must submit to the control.

After referring to certain English authorities the court, at page 129, illustrated the application that had been made of these principles in this country in the following language:

> In later times, the same principle came under consideration in the Supreme Court of Alabama. That court was called upon, in 1841, to decide whether the power granted to the city of Mobile to regulate the weight and price of bread was unconstitutional, and it was contended that "it would interfere with the right of the citizen to pursue his lawful trade or calling in the mode his judgment might dictate;" but the court said, "there is no motive * * * for this interference on the part of the legislature with the lawful actions of individuals, or the mode in which private property shall be enjoyed, unless such calling affects the public interest,

> or private property is employed in a manner which directly affects the body of the people. Upon this principle, in this State, tavern-keepers are licensed; * * * and the County Court is required, at least once a year, to settle the rates of innkeepers. Upon the same principle is founded the control which the legislature has always exercised in the establishment and regulation of mills, ferries, bridges, turnpike roads, and other kindred subjects." (*Mobile* v. *Yuille*, 3 Ala. N. S. 140.)

The Alabama case just cited involved the validity of a city ordinance regulating bakers, prescribing the weight of loaves of bread and fixing the prices at which they should be sold. In sustaining the ordinance, the court said (p. 141):

> Where a great number of persons are collected together in a town or city, a regular supply of wholesome bread is a matter of the utmost importance.

So, during a great war, a regular supply of the necessaries of life at prices which are not prohibitive is a matter of the same public concern. If, in time of peace, a municipality may, for the protection of a limited part of the public, fix the price of bread, surely the Federal Government, possessing, so far as necessary for the conduct of a war, the same power, may do likewise.

The Government, both State and Federal, has never hesitated to regulate and control such business as that of common carriers, water companies, gas companies, and similar corporations. Although in the

Munn case it was said, in plain terms, that when private property is "affected with a public interest it ceases to be *juris privati* only" and that "property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large," an effort was for a time made to limit the scope of the decision in that case. Astute lawyers thought they found in the language employed by the court justification for the contention that the right of governmental control and regulation applied only to such corporations as, by reason of special privileges enjoyed, were under the obligation to serve all the public alike, or a business which was monopolistic in character. But after elaborate consideration, the doctrines announced in the *Munn* case were amplified and reaffirmed in *Budd* v. *New York* (143 U. S. 517) and *Brass* v. *Stoeser* (153 U. S. 391). Speaking of the latter case in *German Alliance Insurance Co.* v. *Kansas* (233 U. S. 389, 410), the court said:

> The case is important. It extended the principle of the other two cases and denuded it of the limiting element which was supposed to beset it—that to justify regulation of a business the business must have a monopolistic character.

And again, at page 411:

> The cases need no explanatory or fortifying comment. They demonstrate that a business, by circumstances and its nature, may rise from private to be of public concern and be subject, in consequence, to governmental regu-

> tion. And they demonstrate, to apply the language of Judge Andrews in *People* v. *Budd* (117 N. Y. 1, 27), that the attempts made to place the right of public regulation in the cases in which it has been exerted, and of which we have given examples, upon the ground of special privilege conferred by the public on those affected can not be supported. "The underlying principle is that business of certain kinds holds such a peculiar relation to the public interests that there is superinduced upon it the right of public regulation."

It was upon this principle that insurance was held to be so impressed with a public interest as to be subject to governmental control and regulation, even to the extent of fixing rates. It is upon the same principle that banking and similar business are included in the same governmental control.

It has thus been definitely settled that to be subject to governmental control, as the public interests may require, it is not necessary that a business either enjoy special privileges or be monopolistic. Enough appears if, by reason of its nature and existing circumstances, it affects the public at large and is of public concern.

To illustrate: It is difficult to see how it can be said that the laws in force everywhere limiting the rate or charge for the use of money do not offend against the liberty of contract, but that a law which, to protect the public and the Government itself, under the stress of famine or war, forbids an unrea-

sonable charge for handling and dealing in the food necessary to sustain life does so offend.

The baker has been a favorite target for these statutes for the purpose of regulating prices. The reason doubtless is that his product is of prime necessity even for the poorest. His is no more a public business than that of the grocer or any other merchant dealing in necessaries. The public interest with which his business is impressed arises alone from the fact that he makes and sells that which the public must have. The same character of public interest attaches to the business of every man who offers for sale to the public any of the necessaries of life. If the one is subject to governmental regulation and control, the other must be equally so. It would seem beyond doubt, therefore, that it is one of the inherent governmental powers to control dealers in the necessaries of life with respect to their prices and profits whenever such action becomes necessary for the protection of the public. While, ordinarily, this power resides in our State governments, for the reason that it is not necessary to the effective exertion of the powers which the Federal Government may exercise in times of peace, yet when the Federal Government is confronted with a state of war which requires for the defense of the nation and the prosecution of the war a husbanding and conservation of all the resources of the country, such measures as are necessary to accomplish that result are within the powers of Congress. The laws now in question were enacted under conditions that required Congress to exert its war power.

The object it sought to accomplish was one which it was its duty to accomplish if possible. The only question then would seem to be whether the means actually adopted are subject to any constitutional objection.

A Government possessed of the ordinary governmental powers, such as a State Government, or Congress, when legislating for the District of Columbia, may fix the rate of interest at which money may be loaned, the price at which bread may be sold or chimneys swept. So far as necessary for the conduct of the war, the Federal Government has all these powers and, in addition, may put any citizen in its armies at nominal wages. Is it conceivable that such a Government may not regulate the prices which commission merchants and brokers may charge for services necessary to the well-being of the families of the men at the front? If, for the protection of the public, one may be required to become a soldier at nominal wages, is there any reason for saying that the Government may not, to protect itself and the public from those whose greed would take advantage of war conditions, limit the profits which a merchant may derive from capital invested in the things which are necessary to sustain life? The right to exact usury or to extort unreasonable profits from the dire necessities of the nation can not be more sacred than human life or the right of a citizen to follow the avocation of his choosing rather than become a soldier.

IV.

The nature and effect of the Lever Act and the amendatory Act of 1919.

In August, 1917, when this country had entered in earnest into the war, Congress passed the Lever Act. Its object, as stated above, was, for the protection both of the Government and the public, to prevent undue inflation in the prices of those things which it was necessary for the Government to have for its soldiers and for all the people to have for their subsistence. It was a difficult problem. It was impracticable for Congress by a statute to fix a schedule of prices. War conditions would undoubtedly increase the cost of labor and make uncertain the expense of producing any article. If a price had been fixed on certain staples in August, 1917, it might be, 30 days later, impossible to produce those articles at the prices fixed. So many things entered into the legitimate making of prices that, under any kind of system of control, they were certain to vary from time to time during the war. The absolute fixing of prices by Congress might practically stop production, and certainly would tend to diminish production when it was of vital importance that production should increase. The underlying purpose of the Act was to guard and protect the Government and the public against those who might be disposed to take advantage of war conditions to secure to themselves, out of the necessities of the public, extortionate profits. Again, it was impracticable to

lay down any fixed and unvarying schedule of profits that would be reasonable. No rule that would fix a certain percentage of cost price as a legitimate profit could, with justice, be uniformly applied. The rate of profit that may be legitimately charged varies with the cost of handling different articles and in different lines of business.

What Congress undertook to do, then, was to prohibit certain things the natural tendency of which would be to enhance prices, and to retain to the Government such control as might become necessary under varying circumstances. Accordingly, section 4 of the Lever Act made it unlawful (1) to destroy or waste necessaries; (2) to hoard them; (3) to monopolize or attempt to monopolize them; (4) to engage in any discriminatory and unfair practices, or in deceptive or wasteful practices in handling them; (5) to conspire to limit production, to restrict distribution, or to exact excessive prices for necessaries. Some of these forbidden things—such as the hoarding of necessaries—were declared to be offenses for which the offender should be prosecuted criminally. The sale of necessaries, however, at excessive prices was not in and of itself made a criminal offense. Congress apparently felt that prices could be better controlled in another way. Accordingly, by section 5 of the Act, it empowered the President to require a license for the importation, manufacture, storage, mining, or distribution of any necessaries, and expressly gave him the power to withhold or revoke the license of any dealer who sold his goods at unjust, unreasonable,

discriminatory, or unfair prices or profit. This section was to be enforced through the provision that any person required to have a license who should do business without obtaining it should be subject, upon conviction, to fine and imprisonment. Under this section, the President organized the Food Administration, and, through it, administered a license system, by which he controlled the prices of necessaries. After the armistice, however, and when it seemed probable that actual hostilities would not be resumed, Congress evidently felt that it was not longer necessto appropriate the funds necessary to continue the expensive Food Administration, and the licensing system went out of existence. Prices were high and seemed to be going higher. The cost of living had become an acute question, which the President called to the attention of Congress. The amendatory Act of October, 1919, was the result. The pertinent part of that Act is that it is made a criminal offense "to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries." It is a violation of this provision of the law with which the defendant in error is charged.

V.

The constitutionality of the statutes in question has been the subject of controversy in many of the lower courts with conflicting results.

These Acts have been assailed in many jurisdictions upon the two grounds upon which they were assailed in this case and the further ground that, by

reason of the exemption in favor of farmers and others, they are void on account of an arbitrary classification in their application.

The contention that Congress was without power to enact laws of this general nature, either in August, 1917, or October, 1919, has been nearly if not quite uniformly rejected by the courts.

Only two cases appear to have reached a circuit court of appeals involving the other two objections to the constitutionality of these Acts. One is the case of *Hulett C. Merritt* v. *United States* (264 Fed. 870). This was a prosecution under the original Lever Act, in which a violation of section 6, prohibiting the hoarding of necessaries, was charged. That section defines hoarding, among other things, to be necessaries "held, contracted for, or arranged for by any person in a quantity in excess of his reasonable requirements for use or consumption by himself and dependents for a reasonable time." Exactly the same objections that are now made against the Act of October, 1919, were urged—that is, that the Act was too vague and uncertain to admit of enforcement as a criminal law, and also that it was void on account of arbitrary classification through the exemption of farmers and others. Both contentions were rejected by the Circuit Court of Appeals for the Ninth Circuit, and a petition for certiorari is now pending before this court.

The only case in a circuit court of appeals directly involving a charge of selling necessaries at unreasonable prices, as prohibited by the Act of October,

1919, is *C. A. Weed & Co.* v. *Stephen T. Lockwood*, decided by the Circuit Court of Appeals for the Second Circuit, but not yet reported. This case, upon full consideration of all the questions now made, was disposed of in favor of the Government and the Act of October, 1919, held constitutional and valid.

Many of the District Judges have had occasion to consider these questions and quite generally, but with some exceptions, the Government's contention has been sustained and the Acts in question upheld.

The provision against hoarding contained in section 6 of the original Act, though almost equally with the provision as to reasonable prices subject to objections now made, has given rise to but little controversy, and, so far as considered at all by the lower courts, has been sustained. In addition to the ruling by the Circuit Court of Appeals of the Ninth Circuit above referred to, this section has been held constitutional by Judges Garvin and Chatfield, in New York, and by Judge Lewis, in Colorado, in the case of *United States* v. *Swedlow* (264 Fed. 1016), and by the District Court for the Southern District of California.

In District Court cases the constitutionality of the Act of October, 1919, prohibiting the making of unjust and unreasonable charges for necessaries, has been sustained in the following reported cases:

Weed & Co. v. *Lockwood*, 264 Fed. 453 (decided by Judge Hazel, in New York).

United States v. *Oglesby*, 264 Fed. 691 (decided by Judge Sibley, in Georgia).

United States v. *Rosenblum*, 264 Fed. 378 (decided by Judge Thomson, in Pennsylvania).

United States v. *Spokane Dry Goods Co.*, 264 Fed. 209 (decided by Judge Rudkin, in Washington).

United States v. *Myatt*, 264 Fed. 442 (decided by Judge Connor, in North Carolina).

The same ruling has been made in the following unreported cases:

United States v. *Goldsmith*, decided by Judge Brown, in Rhode Island.

United States v. *Roth*, decided by Judge Knox, in New York.

United States v. *Taylor*, decided by Judge Sanford, in Tennessee.

United States v. *Blumenthal*, decided by Judge Bledsoe, in California.

United States v. *Diamond Shoe & Garment Co.*, decided by Judge Pritchard, in West Virginia.

United States v. *Paris*, decided by Judge Howe, in New York.

United States v. *Fabian*, decided by Judge Bourquin, in Montana.

United States v. *Russell*, decided by Judge Foster, in Louisiana.

Judge Westenhaver, in Ohio, has also held the Act constitutional in denying an injunction against its enforcement, and several other judges have sustained the act in charges to the grand jury.

On the other hand, the Act of October, 1919, has been held unconstitutional in the following reported cases:

United States v. *Cohen Grocery Co.*, decided by Judge Faris, in Missouri, 264 Fed. 218.

Detroit Creamery Co. v. *Kinnane*, 264 Fed. 845, decided by Judge Tuttle, in Michigan. Judge Tuttle also made the same ruling in two other cases.

In the case of *Tedrow* v. *Lewis*, which is now No. 357 on the docket of this court, Judge Lewis, in Colorado, held the Act unconstitutional. In *United States* v. *Armstrong*, Judge Anderson, in Indiana, held the Act unconstitutional upon the ground of arbitrary classification. Other unreported cases in which the Act was held unconstitutional are:

United States v. *People's Fuel Co.*, decided by Judge Dooling, in Arizona.

Lamborn v. *McAvoy*, decided by Judge Thompson, in Pennsylvania.

United States v. *Bernstein*, decided by by Judge Woodrough, in Nebraska.

Judge Evans, in Kentucky, and Judge Hutcheson, in Texas, ruled that the Act was unconstitutional in charges to the grand jury. In *Kennington* v. *Palmer et al.*, Judge Holmes, in Mississippi, without passing on the constitutional questions, declined to grant an injunction against the enforcement of the law. This case is now No. 367 on the docket of this court.

It will thus be seen that, with few exceptions, the lower courts have sustained the law.

VI.

The indictment is not open to the objection that it does not sufficiently give the defendant notice of the accusation, and is a good indictment unless it can be said that the Act upon which it is based is unconstitutional.

The objection is made that the indictment in this case fails to meet the constitutional requirement that, in criminal cases, an accused shall be informed of the nature and cause of the accusation. The indictment, however, specifically describes the transaction which, it is charged, constituted an offense. The first count, for instance, charges that the defendant, being a dealer in necessaries, sold to one B. Heligman 50 pounds of granulated sugar on or about the 3d day of December, 1919, for which a charge of $10.07 was made, and that this was an unjust and unreasonable rate and charge. The defendant's attention is unmistakably directed to a particular transaction. If he should ever be indicted for the same transaction, this indictment would, without difficulty, furnish the basis for a defense to a further prosecution. With attention thus directed to a specific transaction, it is charged that the price named was unjust and unreasonable. If it is competent for Congress to denounce as an offense an unreasonable and unjust act and leave it to the jury to determine from the evidence whether, as a fact, the transaction complained of is unjust and unreasonable, the indictment in this case gives to the defendant all the notice which the Constitution requires or which could prop-

erly be given. The real objection in this case is that the Act of Congress is itself too vague and uncertain to admit of enforcement. We therefore pass to a consideration of that question.

VII.

The Act of October, 1919, is not subject to the objection that it is too vague and uncertain.

The demurrer in this case states the objection to the Act of October, 1919, in this language:

> The section of the amended statute upon which the counts are based violates the Sixth Amendment to the Constitution, in that it affords a person no standard or criterion by which he can, or could determine, whether any act contemplated by him would be violative of the statute; it does not afford a standard or criterion in conformity to which an indictment based upon the section will, or can, advise one accused under the section of the nature and cause of the accusation against him; it contains and provides no definition of terms employed so that it can be determined whether an act alleged to have been done is such an act as the section prohibits; it leaves to the determination of courts and juries what the Congress alone can determine within any lawful limitations, conditions, or circumstances. (Rec., pp. 5-6.)

The question is whether Congress may declare it to be a criminal offense to charge an unreasonable price for necessaries, leaving it to a jury to determine, from all the facts and circumstances, whether a particular

charge is reasonable or unreasonable, or whether it is necessary for the Act itself to provide a more definite standard by which the jury must be governed.

If the reasonableness of a rate or charge can be said to be a fact, then undoubtedly it may be left to the determination of the jury under the circumstances disclosed by the evidence.

The rule which has been invoked against this statute was stated in *United States* v. *Brewer* (139 U. S., 278, 288) as follows:

> Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid.

And again:

> Before a man can be punished, his case must be plainly and unmistakably within the statute.

There is no occasion to question the soundness of this rule. The only difficulty is with its application to particular cases. Undoubtedly a statute creating an offense must use language which will convey to the average mind information as to the act or fact which it is intended to make criminal. But statutes describing crimes must necessarily be more or less general in their terms. It is impossible to fix rules of conduct to cover every circumstance or condition that may arise. It is perhaps equally impossible to so frame a statute that all men will agree as to just what circumstances will or will not constitute the crime denounced. There are certain standards both of law and of fact which may be assumed in enacting legislation. When these standards are invoked, a

question of fact is presented for the jury to determine under the particular facts of each case, and it is no objection to the statute that it is necessary to invoke these external standards. Thus, in *Miller* v. *Strahl* (239 U. S., 426, 434) it was said:

> Rules of conduct must necessarily be expressed in general terms and depend for their application upon circumstances, and circumstances vary. It may be true, as counsel says, that "men are differently constituted," some being "abject cowards and few only are real heroes"; that the brains of some people work "rapidly and normally in the face of danger while other people lose all control over their actions." It is manifest that rules could not be prescribed to meet these varying qualities. Yet all must be brought to judgment. And what better test could be devised than the doing of "all in one's power" as determined by the circumstances?

To determine from the evidence in a given case what is reasonable or unreasonable is to perform exactly the same function which a jury performs when the question of negligence is submitted to it.

That the language used in this statute is not so general and uncertain as to be subject to constitutional objections would seem now to be definitely settled by recent rulings of this court. In the case of *Waters-Pierce Oil Co.* v. *State of Texas* (No. 1) (212 U. S. 86), the court had under consideration a statute of the State of Texas which denounced contracts and arrangements "reasonably calculated"

to fix and regulate the price of commodities and which "tend" to accomplish the prohibited results. It was insisted that these laws were so indefinite that no one can tell what acts are embraced within their provision. It was argued that laws of this nature ought to be so explicit that all persons subject to their penalties may know what they can do and what it is their duty to avoid. The case of *Tozer* v. *United States* (52 Fed. 917), in which Mr. Justice Brewer, then Judge of the Circuit Court, held that the criminality of an act can not depend upon whether a jury can think it reasonable or unreasonable was cited. It was held, however, that the Texas statutes did not give the broad power to a court or jury to determine the criminal character of the act in accordance with their belief as to whether it is reasonable or unreasonable. The court said (p. 110):

> As to the phrase, "reasonably calculated," what does it include less than acts which, when fairly considered, tend to accomplish the prohibited thing, or which make it highly probable that the given result will be accomplished?

All questions which could be said to be left open by the opinion just referred to were, however, put completely at rest by what this court said in *Nash* v. *United States* (229 U. S. 373). That case was a prosecution under the criminal features of the Sherman Antitrust Act. The court had previously held that, in order to be prohibited, contracts and combinations must *unduly* restrict competition or *unduly*

obstruct the course of trade. At once the contention was made in the *Nash* case that, since only *undue* restricting of competition and *undue* obstructing of the course of trade were prohibited, the criminal features of the Act could not be enforced for the same reasons now denounced against the Lever Act. It was said that the crime thus defined contains, in its definition, an element of degree as to which estimates may differ, with the result that a man might find himself in prison because his honest judgment did not coincide with that of a jury of less competent men. The court, however, said, at page 377:

> But apart from the common law as to restraint of trade thus taken up by the statute, the law is full of instances where a man's fate depends on his estimating rightly—that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death. "An act causing death may be murder, manslaughter, or misadventure, according to the degree of danger attending it" by common experience in the circumstances known to the actor. "The very meaning of the fiction of implied malice in such cases at common law was that a man might have to answer with his life for consequences which he neither intended nor foresaw." (*Commonwealth* v. *Pierce*, 138 Massachusetts, 165, 178; *Commonwealth* v. *Chance*, 174 Massachusetts, 245, 252.) "The criterion in such cases is to examine whether common social duty would,

under the circumstances, have suggested a more circumspect conduct." (1 East P. C. 262.) If a man should kill another by driving an automobile furiously into a crowd, he might be convicted of murder, however little he expected the result. (See *Reg.* v. *Desmond* and other illustrations in Stephen, Dig. Crim. Law, art. 223, 1st ed., p. 146.) If he did no more than drive negligently through a street, he might get off with manslaughter or less. (*Reg.* v. *Swindall*, 2 C. & K. 230; *Rex* v. *Burton*, 1 Strange, 481.) And in the last case he might be held although he himself thought that he was acting as a prudent man should. (See *The Germanic*, 196 U. S. 589, 596.) But without further argument, the case is very nearly disposed of by *Waters-Pierce Oil Co.* v. *Texas* (No. 1) (212 U. S. 86, 109), where Mr. Justice Brewer's decision and other similar ones were cited in vain. We are of opinion that there is no constitutional difficulty in the way of enforcing the criminal part of the act.

If, therefore, it can constitutionally be left to the jury to determine, from the facts and circumstances of a particular case, whether a given contract or combination *unduly* restricts competition or restrains trade, it is difficult to see any principle upon which it can be denied that the same jury may be left to determine, from a given state of facts and circumstances, whether a particular price demanded for necessaries is reasonable or unreasonable. Later cases have emphasized the rule laid down in the *Nash* case. In *Omacchevarria* v. *Idaho* (246 U. S.

343), the court had before it a statute of Idaho prohibiting any person having charge of sheep to permit or suffer them "to be herded, grazed or pastured on any cattle range previously occupied by cattle, or upon any range usually occupied by any cattle grower, either as a spring, summer or winter range for his cattle." The court said, at page 348:

> It is also urged that the Idaho statute, being a criminal one, is so indefinite in its terms as to violate the guarantee by the Fourteenth Amendment of due process of law, since it fails to provide for the ascertainment of the boundaries of a "range" or for determining what length of time is necessary to constitute a prior occupation a "usual" one within the meaning of the act. Men familiar with range conditions and desirous of observing the law will have little difficulty in determining what is prohibited by it. Similar expressions are common in the criminal statutes of other States. This statute presents no greater uncertainty or difficulty, in application to necessarily varying facts, than has been repeatedly sanctioned by this court. (*Nash* v. *United States*, 229 U. S. 373, 377; *Miller* v. *Strahl*, 239 U. S. 426, 434) Furthermore, any danger to sheepmen which might otherwise arise from indefiniteness, is removed by Section 6314 of Revised Codes, which provides that: "In every crime or public offense there must exist a union, or joint operation, of act and intent, or criminal negligence."

And still later, in *Arizona Employers' Liability Cases* (250 U. S. 400, 432), it was said:

> There are cases in which even the criminal law requires a man to know facts at his peril. Indeed, the criterion which is thought to be free from constitutional objection, the criterion of fault, is the application of an external standard, the conduct of a prudent man in the known circumstances; that is, in doubtful cases, the opinion of the jury, which the defendant has to satisfy at his peril and which he may miss after giving the matter his best thought.

The case of *International Harvester Co.* v. *Kentucky* (234 U. S. 216), will be cited as authority for a contrary rule. In deciding that case, however, the court took pains to show that it was not in conflict with the *Nash* case, and an examination of it makes clear the distinction between the two cases. In the *International Harvester Company* case the Kentucky court had held that the law, in effect, made lawful a combination for the purpose of controlling prices unless for the purpose or with the effect of fixing a price that was greater or less than the *real value* of the article, and that by its real value was meant "its market value under fair competition, and under normal market conditions." The objection which this court found to the statute was that this definition of real value was one which it was practically impossible to apply, for the reason that it did not relate to existing facts, but to facts which might have existed but for

conditions which already existed. Mr. Justice Holmes said, at page 222:

> Value is the effect in exchange of the relative social desire for compared objects expressed in terms of a common denominator. It is a fact and generally is more or less easy to ascertain. But what it would be with such increase of a never extinguished competition as it might be guessed would have existed had the combination not been made, with exclusion of the actual effect of other abnormal influences, and, it would seem with exclusion also of any increased efficiency in the machines but with inclusion of the effect of the combination so far as it was economically beneficial to itself and the community, is a problem that no human ingenuity could solve. The reason is not the general uncertainties of a jury trial but that the elements necessary to determine the imaginary ideal are uncertain both in nature and degree of effect to the acutest commercial mind. The very community, the intensity of whose wish relatively to its other competing desires determines the price that it would give, has to be supposed differently organized and subject to other influences than those under which it acts. It is easy to put simple cases; but the one before us is at least as complex as we have supposed, and the law must be judged by it. In our opinion it can not stand.

And proceeding to distinguish the case from the *Nash* case, he added:

> We regard this decision as consistent with *Nash* v. *United States* (229 U. S. 373, 377), in

> which it was held that a criminal law is not unconstitutional merely because it throws upon men the risk of rightly estimating a matter of degree—what is an undue restraint of trade. That deals with the actual, not with an imaginary condition other than the facts. It goes no further than to recognize that, as with negligence, between the two extremes of the obviously illegal and the plainly lawful there is a gradual approach and that the complexity of life makes it impossible to draw a line in advance without an artificial simplification that would be unjust. The conditions are as permanent as anything human, and a great body of precedents on the civil side coupled with familiar practice make it comparatively easy for common sense to keep to what is safe. But if business is to go on, men must unite to do it and must sell their wares. To compel them to guess on peril of indictment what the community would have given for them if the continually changing conditions were other than they are, to an uncertain extent; to divine prophetically what the reaction of only partially determinate facts would be upon the imaginations and desires of purchasers, is to exact gifts that mankind does not possess.

In other words, it is held that while it is competent to leave the jury to determine what is an undue restriction of commerce under existing circumstances, it is not competent to make the guilt or innocence of a man depend upon what guess the jury may make as to what conditions would be if the conditions actually existing did not exist. So, it might not be

competent to make the guilt or innocence of one charged with making unreasonable prices during the war depend upon what the jury might think would have been reasonable prices if there had been no war.

The application of a rule in the *Nash* case to the laws now under consideration has been admirably stated by several of the district judges who have passed on this question. Thus, in *United States* v. *Rosenblum* (264 Fed. 578, 582), it was said:

> Obviously, it would be impossible for Congress to fix any definite standard, any fixed rate, as the measure for determining an unjust or unreasonable rate or charge. This because profits must always depend upon a number of varying elements, including time, place, and circumstance. A fixed standard in practical operation would necessarily prove unjust and unreasonable in the extreme. The words used by Congress were of common use and of well-known meaning. The merchant in passing upon the question of what is an unjust and unreasonable rate or charge deals with the actual, not with an imaginary condition other than the facts. Since, as the Supreme Court has said, "between the two extremes of the obviously illegal and the plainly lawful there is a gradual approach and that the complexity of life makes it impossible to draw a line in advance without an artificial simplification that would be unjust," the only alternative, if profiteering is to be lawfully condemned, was to place the responsibility upon the dealer. If in doubt, he should keep on the safe side. If for greater gain he takes the risk of violating

the statute, he can not complain if the jury denounces his act as unlawful.

In *United States* v. *Oglesby Grocery Co. et al.* (264 Fed. 691, 695) Judge Sibley said:

> Evidently standards may exist in law or fact to which the Legislature may refer, and the existence of them is a matter of importance. It must be noted that the act of August 10, 1917, is dealing with necessaries; articles that, by reason of their necessity, are in common use, dealt in continuously and everywhere. The range of prices and profits in them in time of peace is well established and well understood. The changes that occur in such prices, and the causes therefor, are well known. The dealer is not in a novel venture. The descriptive words of the act are thus defined by Webster:
>
> Unjust, as "contrary to justice and right; wrongful." Excessive, as "exceeding what is usual and proper." Unreasonable, as "beyond the limits of reason or moderation; immoderate; exorbitant." Immoderate, in turn, means "exceeding just, usual or suitable bounds." Exorbitant means "deviating from the normal or customary course; going beyond the rule or established limits of right or propriety."
>
> The words used by Congress in reference to a well-established course of business fairly indicate the usual and established scale of charges and prices in peace times as a basis, coupled with some flexibility in view of changing conditions. The statute may be construed to forbid, in time of war, any de-

parture from the usual and established scale of charges and prices in time of peace, which is not justified by some special circumstance of the commodity or dealer. Evidently increased costs of production and transportation would justify a corresponding increase in price, and necessarily increased expenses in the conduct of business would justify an increased charge for handling; but the existence and sufficiency of the justification is left, in each case, to the courts. This does not differ, in substance, from the situation arising under the Georgia homicide statutes which forbid generally the killing of a human being, but admit of justifications and mitigations which are measured finally by the opinion of juries. The dealer knows what was, in time of peace, usual and customary. Within that limit he is safe. He judges of the justification for departure from it at his own risk. That the usual and customary may serve as defining a crime was ruled in *Omaechevarria* v. *Idaho* (246 U. S. 343; 38 Sup. Ct. 323; 62 L. Ed. 763).

VIII.

The principle discussed above, as applied to this case, is not a new departure, but has consistently been applied to numerous criminal laws.

This statute is no more uncertain in its terms and leaves no more to the determination of the jury than numerous statutes which are daily enforced in the criminal courts throughout the United States. In the *Nash* case, *supra*, certain Massachusetts cases were referred to approvingly. In these cases, the

rule, which applies everywhere, was applied—that is, of what degree of homicide a man may be guilty, or whether the homicide be justifiable, depends, at last, upon the judgment of the jury as to whether, under all the circumstances, the act which results in death was justifiable. A person taking the life of another may have honestly believed that the act which he did was necessary to save his own life, but the test everywhere is whether this belief was entertained upon reasonable grounds, or upon grounds which would control the belief of a reasonable man. Thus, constantly with a man's life at stake, juries are called upon to determine whether more force has been used than was reasonably necessary under the circumstances, and whether, under given circumstances, a reasonable man would be justified in believing that his life was in danger. In all such cases a man may not know when he kills another whether he is committing murder or justifiable homicide any more certainly than a merchant selling necessaries can know whether he is charging a reasonable or unreasonable price. In both cases he may be honest but mistaken. If the Constitution does not protect him from being punished in the one case, it certainly does not protect him in the other. In *United States* v. *Oglesby Grocery Co.* (264 Fed. 691, 693–694), Judge Sibley has very strongly presented this phase of the case as follows:

> Every code of criminal laws contains many vague definitions of crime. There are none

but statutory offenses in Georgia. Many of the standards set up by her Penal Code use the very term "reasonable" or others as loose, of the application of which the jury must judge, and these statutes are daily upheld and enforced. Section 40 forbids conviction generally, where "it satisfactorily appears there was no evil design, or intention, or *culpable neglect*." In the law of homicide, section 65 declares:

"For if there should have been an interval between the assault or provocation given and the homicide, *of which the jury in all cases shall be the judges, sufficient* for the voice of reason and humanity to be heard, the killing shall be attributed to deliberate revenge, and be punished as murder."

In dealing with homicide justified by fear of felony about to be committed on person or habitation, section 71 declares "it must appear that the circumstances were sufficient to excite the fears of a reasonable man," an ideal perfectly known only to juries. And section 75 says of justification:

"All other instances which stand upon the *same footing of reason and justice* as those enumerated shall be justifiable homicide."

By section 103 "opprobrious words, or abusive language," may be shown in a case of assault and battery, "which may or may not amount to a justification, according to the nature and extent of the battery, *all of which shall be determined by the jury*." Section 922, dealing with arrests without warrant, requires

a warrant to be seasonably secured, and declares, "and no such imprisonment shall be legal beyond a *reasonable time*, allowed for this purpose," on pain of criminal punishment under section 106. By section 117 a railway employee "guilty *of negligence*, either by omission of duty or by any act of commission, in relation to the matters entrusted to him, or about which he is employed, from which negligence serious bodily injury * * * occurs," is guilty of a felony. Section 704 makes criminal any person who acquires any money "by *any fraud or ill practice*, in playing at any game," and section 719 "any person using *any deceitful means or artful practice*, other than those which are mentioned in this Code, by which an individual, or a firm, or a corporation, or the public is defrauded and cheated." Section 381 makes criminal open lewdness, or any notorious act of *public indecency tending to debauch the morals*. Section 383, the keeping of a "*common, ill-governed and disorderly* house, to the encouragement of idleness," etc. Sections 385 and 386 deal with pictures and writings described as "obscene and indecent or *tending to debauch the* morals," and 387 makes criminal the use of "*obscene and vulgar or profane* language" in the presence of a female, and "*indecent or disorderly conduct* in the presence of females on passenger cars, street cars, or other places of like character." Similar descriptions of crime are found in the Federal Penal Code, sections 102, 211, and 212 (Comp. St. sections 10271, 10381, 10382).

> It is evident that the standards of decency and propriety change with time and place. Under none of these statutes can a man know with certainty how his conduct will be judged by others.

The statutes referred to in this opinion are fairly illustrative of the criminal statutes on the books of practically every State in the Union. There are statutes which punish criminal negligence, and numerous other laws under which an individual and the jury which afterwards tries him may honestly differ as to whether a particular act is a crime or not. The great bulk of the criminal laws of the various States of the Union are as much subject as the law now under consideration to the objection which is urged against it. In view of the recent decisions of this court, which have been quoted above, the question would now scarcely seem to be an open one.

IX.

The exclusion of farmers and other producers from the inhibition of the statute which applies to dealers does not constitute an arbitrary classification.

The demurrer in this case does not raise this question. It is raised, however, in the case of *Harry B. Tedrow* v. *A. T. Lewis & Sons, et al.*, No. 357 on the docket of this court, which is to be heard immediately following this case. The Government's contention as to the question of classification will be fully presented in its brief in that case, to which reference is now made.

CONCLUSION.

It is respectfully submitted that the judgment of the District Court is erroneous and should be reversed.

WILLIAM L. FRIERSON,
Solicitor General.

SEPTEMBER, 1920.